Nos. 72-1470, 72-1371

In the Supreme Court of the United States

OCTOBER TERM, 1973

BOB JONES UNIVERSITY, PETITIONER

v.

GEORGE P. SHULTZ, SECRETARY OF THE TREASURY OF THE UNITED STATES, AND DONALD C. ALEXANDER, COMMISSIONER OF INTERNAL REVENUE

DONALD C. ALEXANDER, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

"AMERICANS UNITED" INC., ETC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND DISTRICT OF COLUMBIA CIRCUITS

BRIEF FOR THE RESPONDENTS IN NO. 72-1470 AND REPLY BRIEF FOR THE PETITIONER IN NO. 72-1371

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OPINIONS BELOW

The findings of fact, conclusions of law, and preliminary injunction order of the district court (App. A114-A129)[1] are reported at 341 F. Supp. 277. The opinion of the court of appeals (App. A132-A140) is reported at 472 F. 2d 903. The opinion of the court of appeals denying rehearing (App. A150-A151) is reported at 476 F. 2d 259.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 1973.[2] Petitioner's petition for rehearing *en banc* was denied on March 21, 1973 (App. A150-A151). The petition for a writ of certiorari was filed on April 30, 1973, and was granted on October 9, 1973.[3] The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Petitioner is a non-profit private sectarian university which does not admit black students. In 1942, the Internal Revenue Service had given it an advance ruling that petitioner was exempt from income tax pursuant to Section 501(c)(3) of the Internal Revenue Code of 1954 and assuring that gifts to it would

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[1] "App." references are to the record appendix filed by petitioner in No. 72-1470.

[2] The judgment was not included in the record appendix.

[3] The order granting the writ of certiorari was not included in the record appendix.

be deductible as charitable contributions under Section 170(a). In 1971, the Commissioner proposed to withdraw this ruling because of petitioner's racially discriminatory admissions policy. The question presented is:

Whether petitioner is barred by the Anti-Injunction Act, 26 U.S.C. 7421(a), and the Declaratory Judgment Act, 28 U.S.C. 2201-2202, from obtaining injunctive or declaratory relief restraining the Commissioner from withdrawing the ruling respecting petitioner's tax-exempt status and deductibility of contributions made to it.

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Internal Revenue Code, including the Anti-Injunction Act, and the Declaratory Judgment Act, are set forth in Appendix A, *infra*, pp. 42-46.

STATEMENT

This case and *Alexander* v. *Americans United, Inc.*, No. 72-1371, October Term, 1973, present the identical question whether the Anti-Injunction and Declaratory Judgment Acts bar suits to restrain the Internal Revenue Service's withdrawal of rulings recognizing tax exempt status and eligibility for tax deductible contributions. Because of the common issue in both cases, the Court has scheduled oral arguments in this case in tandem with that in No. 72-1371. In order that the Court may consider the single legal issue involved in the factual context of both cases, this

document contains both the brief for the respondents in No. 73-1470 and the reply brief for the petitioner in No. 72-1371. Although the statement of facts set forth below concerns only petitioner Bob Jones University, we will present argument here with respect to both cases.[4]

Petitioner is an eleemosynary South Carolina Corporation engaged in religious and educational activities in Greenville, South Carolina. It has chosen the field of education, principally at the college level, as the vehicle for teaching and propagating its fundamentalistic religious beliefs (App. A5, A114-A115). As stated in its charter (App. A115), petitioner's purposes are to "conduct an institution of learning for the general education of youth * * * giving special emphasis to the Christian religion and the ethics revealed in the Holy Scriptures [and] combatting all atheistic, agnostic, pagan, and so-called scientific adulterations of the Gospel * * *."[5]

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[4] A copy of the government's opening brief filed in No. 72-1371 and the record appendix in that case will be served on petitioner Bob Jones University, together with this brief. "R." references are to the record appendix in No. 72-1371.

[5] In order to achieve its stated purposes, petitioner requires its students to attend daily chapel services. All classes and meetings held begin and end with prayers. Most students are required to enroll in one religion class each semester. All faculty members are required to teach and adhere to the religious beliefs and principles of the school, and any member of the faculty or student body who teaches or promotes religious beliefs to the contrary is subject to dismissal (App. A116).

One of petitioner's religious beliefs is that God intended the various races of men to live separate and apart, and that intermarriage of different races is contrary to God's will and the Scriptures [6] (App. A5, A16, A115). In keeping with its belief, petitioner has refused to admit unmarried blacks as students in the University. No student is permitted to date or marry outside his own race [7] and petitioner believes that it would be impossible to enforce this rule if it were to adopt a racially nondiscriminatory admissions policy (App. A64-A65, A115-A116).[8]

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[6] The affidavit of petitioner's president, Dr. Bob Jones III, and the attached sermon, "Is Segregation Scriptural?", presents a detailed explanation of this belief (App. A14-A37).

[7] Petitioner's president explained the connection between its racially discriminatory admissions policy and interracial dating and marriage, as follows (App. A64):

> We accept a few Oriental students, but we do so with a definite understanding that they will not date outside of their own race. If we took Negro students here on this same basis today, they would resent that restriction and would cry that they were being discriminated against because they were not allowed to date Orientals or Caucasians. If we had to expel a black student today for the worst possible offense—stealing, attempted rape, or something of that sort—he would cry that he was being persecuted because he was black; and we would be picketed, annoyed, and harassed.

[8] A further consequence of petitioner's discriminatory admissions policy is its ineligibility, since August 26, 1968, to receive grants from the federal government because it has refused to sign the Statement of Compliance prescribed by Section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d and 45 C.F.R. § 80.4(d)(1). Dept. of Health, Education, and

Since 1942, the Internal Revenue Service had determined that petitioner and its predecessor organization Bob Jones College were eligible for tax-exempt status and could receive tax-deductible contributions. On July 10, 1970, however, the Internal Revenue Service announced publicly that it could no longer legally justify its prior allowance of tax-exempt status to private schools maintaining racially discriminatory admissions policies nor could it continue to treat gifts to such schools as deductible charitable contributions for income tax purposes (App. A39-A40, A133). This action was taken after an intensive study of the question by the Department of Justice and of the Treasury Department (App. A81).[9]

Welfare, *Status of Title VI Compliance Interagency Report*, Cum. List No. 296 (Nov. 1, 1973), p. 4. In addition, petitioner is presently challenging the action of the Veterans Administration terminating tuition and other payments to veterans attending Bob Jones University on the ground of its racially discriminatory policies. *Bob Jones University* v. *Johnson*, Civil No. 72-1325 (D. S.C.).

[9] As a result of this change in policy, which was formally published in Rev. Rul. 71-447, 1971-2 Cum. Bull. 230, the Internal Revenue Service did not appeal from the order of a three-judge district court in *Green* v. *Connally*, 330 F. Supp. 1150 (D. D.C.), prohibiting the issuance of tax-exempt status and deductibility of contributions with respect to private schools in Mississippi maintaining racially discriminatory admissions policies. That suit had been brought by a group of Mississippi black parents and their children. In response to an appeal of the decision by a group of white intervenors seeking reversal by this Court on First Amendment freedom of association grounds, the government filed a motion to dismiss. This Court affirmed without opinion. *Coit* v. *Green*, 404 U.S. 997.

On November 30, 1970, the Internal Revenue Service sent a letter of inquiry to each private school in the United States, including petitioner, which had an individual tax-exemption ruling. The letter announced that the Internal Revenue Service's position is that private schools with racially discriminatory admissions policies are not legally entitled to tax exemption and that contributions to such schools are not deductible as charitable contributions. The letter stated that all rulings and determinations issued to private schools would be reviewed in light of this position. Each school was therefore asked to furnish specific information regarding its admissions policy within thirty days (App. A37-A39, A52).[10] On December 30, 1970, petitioner advised the Internal Revenue Service that it did not admit black students (App. A56-A59).

During the next nine months, petitioner's attorneys met and communicated with various high officials of the Internal Revenue Service, including the Commissioner, Randolph W. Thrower, and his successor, Johnnie M. Walters.[11] Throughout this period, pe-

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[10] On December 9, 1970, after receipt of the letter of inquiry from the Internal Revenue Service, petitioner advised its contributors that it was going to "stall" responding to the request for information concerning its racial policies as long as possible. It urgently asked its contributors to make the largest possible donations in order to avail themselves of the deductibility assurance before it was withdrawn (App. A62).

[11] At a meeting with officials of the Internal Revenue Service on April 21, 1971, petitioner's representatives sought and obtained additional time in which to confer with University officials respecting a possible change in the admissions policy

titioner refused to change its racially discriminatory admissions policies and the Internal Revenue Service adhered to its view that such practices precluded tax-exempt status. These discussions terminated in early September 1971, when petitioner notified the Commissioner that it did not intend to alter its racially discriminatory admissions policy (App. A52-A53).

The Commissioner thereupon determined to instruct the District Director to commence the administrative procedures which are followed by the Internal Revenue Service when the tax-exempt status of an organization is called into question. Those procedures allow the organization an opportunity to confer with the staff of the District Director and, if necessary, to file a written protest. The organization is also permitted to confer with officials of the Internal Revenue Service at the National Office in Washington before any final decision is made. Prior to a final decision, the Internal Revenue Service will not conduct an audit of an organization's records or issue

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(App. A46). On July 29, 1971, petitioner's attorney advised an assistant to the Commissioner that the admissions policy would not be changed. Nevertheless, he sought and obtained an additional conference with the Internal Revenue Service. On September 8, 1971, Commissioner Walters personally met with petitioner's attorneys and advised them that he intended to instruct the District Director to begin the formal administrative proceedings for the purpose of determining whether to withdraw the tax exemption and deductibility assurance ruling (App. A47-A49, A52-A54, A117).

any notice of proposed deficiency either against the organization or a contributor.[12]

Before these administrative procedures could be initiated, however, petitioner brought this action on September 9, 1971, seeking a preliminary and final injunction restraining the Commissioner from withdrawing the ruling with respect to its tax-exempt status and deductibility of contributions made to it (App. A52-A53).[13] The immediate effect of this suit was to preclude the application of the above-described administrative procedures (App. A7).

The district court granted petitioner's request for injunctive relief *pendente lite* (App. A128-A129). The district court ruled that the diminution of contributions following withdrawal of the ruling with respect to their deductibility would cause petitioner irreparable injury. The Court held that the Anti-Injunction Act, which prohibits suits "for the purpose of restraining the assessment or collection of any tax," was not applicable because, *inter alia*, the suit challenged the constitutionality, rather than the ap-

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[12] A detailed description of these procedures is set forth in Rev. Proc. 69-3, 1969-1 Cum. Bull. 389, which has been superseded by Rev. Proc. 72-4, 1972-1 Cum. Bull. 706 (tax exemption), and Rev. Proc. 68-17, 1968-1 Cum. Bull. 806, now superseded by Rev. Proc. 72-39, 1972-2 Cum. Bull. 818 (deductibility assurance).

[13] If the District Director had been instructed to commence the prescribed administrative procedures, the affidavit of William H. Connett, Assistant to the Commissioner of Internal Revenue, describes how they would have been applied with respect to petitioner (App. A53-A56).

plicability of the non-discrimination requirement. (App. A121-A128).

The court of appeals reversed, concluding that the Anti-Injunction Act barred the suit, notwithstanding the acknowledged injury which would result from the withdrawal of petitioner's ruling with respect to deductibility of contributions (App. A134-A138).

SUMMARY OF ARGUMENT

A

Two acts of Congress, the Anti-Injunction Act and the Declaratory Judgment Act, have recognized that the prompt and efficient collection of the federal revenues is a paramount national concern. These statutes respectively prohibit the federal courts from granting injunctions against the assessment or collection of taxes or declaratory relief with respect to federal taxes. As this Court has observed, such statutes reflect the desire of Congress to avoid the possibility that the courts could interfere with the orderly process of collecting the revenues upon which the government depends for its continued existence.

One narrow exception, created by a decision of this Court, exists to the otherwise broad restriction against injunctive relief in federal tax cases. In *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, the Court unanimously held that a taxpayer seeking an injunction against the collection of taxes must satisfy a twofold test. First, he had to demonstrate that under no circumstances could the government prevail on the merits of its claim. Secondly, he must show

that collection of the tax will result in an irreparable injury for which there is no adequate legal remedy.

It is against this deeply rooted policy of barring the federal courts from exercising their equity powers to encroach upon the administrative determination process necessary for revenue collection that this case and its companion in No. 72-1371 must be viewed. In 1942, the Internal Revenue Service had determined that Bob Jones University and its predecessor organization were eligible for tax-exempt status and could receive tax-deductible contributions. In 1970, however, the Internal Revenue Service, after an intensive study of the question, announced that it could no longer legally justify its prior allowance of such tax treatment to private schools maintaining racially discriminatory admissions policies.

In response to a formal inquiry by the Internal Revenue Service, Bob Jones University stated that it did not and would not admit blacks as students. During repeated conferences between representatives of the University and high officials of the Internal Revenue Service, the University refused to alter its racially discriminatory policy. Despite this firmly stated position by the University, the Internal Revenue Service was nevertheless prepared to follow its prescribed administrative procedures providing for still additional conferences prior to making a final decision with respect to the withdrawal of the ruling. Before the Internal Revenue Service could invoke this procedure, however, the University commenced its suit to restrain the Commissioner from withdrawing the ruling.

The Anti-Injunction Act bars this suit. The Act bars any suit "for the purpose of restraining the assessment or collection of any tax * * *." This is such a suit because any restraint upon the Commissioner's withdrawal of a ruling granting tax-exempt status and eligibility to receive deductible contributions will prevent the assessment of taxes against the recipient organization and its donors who have claimed deductions for charitable contributions. Indeed, the operation of the injunction of the district court had that very effect in this case.

The University, however, claims that this is not a tax case but the use of the taxing power to force it to alter its racially discriminatory admissions policy. But that contention ignores the undisputed fact that the taxes which would have been assessed and collected are income and unemployment taxes, plainly revenue producing in character. Moreover, for purposes of the Anti-Injunction Act, this Court has held that there is no distinction between revenue-producing taxes and those levies which are arguably regulatory.

The position of the Internal Revenue Service that private schools which maintain racially discriminatory admissions policies are ineligible for tax-exempt status is amply supported by decisions of this Court and Acts of Congress evidencing a strong national policy against segregation in public education and prohibiting governmental assistance to private institutions which maintain exclusionary policies based upon race. Moreover, a three-judge district court has specifically held that private schools which, like Bob Jones Uni-

versity, exclude blacks from enrollment, are not eligible for tax-exempt status or to receive deductible contributions. While the correctness of this conclusion appears inescapable, the merits of the Internal Revenue Service's policy with respect to discriminatory private schools is not at issue here. In light of the authorities, however, the University cannot demonstrate that under no circumstances would the government prevail on the merits of its claim pursuant to the first aspect of the *Williams Packing* test. On this basis, the Fourth Circuit correctly refused to enjoin the Commissioner from withdrawing the University's ruling.

B

Although the Fourth Circuit did not reach the question whether the University had adequate legal means to challenge the Commissioner's proposed action, there were three legal remedies available. These were a refund suit for unemployment (F.U.T.A.) taxes, a refund suit by the University for unemployment (F.U.T.A.) taxes, a refund or a Tax Court suit by the University with respect to income taxes, and an action by a contributor either in a refund or a Tax Court suit to test his right to a deduction for a charitable contribution. Such proceedings are all fully adequate methods to obtain judicial review of the question.

That organizations such as the University and Americans United may suffer a decrease in contributions from a revoctaion of their tax-exempt status is a consequence of the fact that litigation does not

instantly resolve these questions. In light of the policy of the Anti-Injunction and Declaratory Judgment Acts to protect the revenue collection process, it seems highly unlikely that the Congress intended organizations such as the University and Americans United to preserve their tax benefits and those of their contributors *pendente lite*. But the preliminary relief sought by both of these organizations would have this effect in derogation of the revenue. As this Court observed in *Williams Packing*, where the taxpayer similarly could not demonstrate that under no circumstances would the government prevail, such injunctive suits "may not be entertained merely because collection would cause an irreparable injury, such as the ruination of the taxpayer's enterprise" (370 U.S. at 6).

Finally, when viewed against the background of the entire rulings program of the Internal Revenue Service, there is little justification for allowing injunctive relief with respect to questions involving exempt status and deductibility of contributions. The congressional policy against injunctions is equally applicable to all federal tax controversies. If the courts could grant injunctive relief with respect to the issuance or withdrawal of such rulings, it would seriously impair the administration of the entire rulings program in which the Internal Revenue Service issues decisions on the tax consequences of a wide variety of transactions. Judicial intervention would eliminate the necessary discretion which must be exercised if the rulings program is to be effective. The rationale of the District of Columbia Circuit's

modification to the *Williams Packing* standard cannot be logically limited to questions involving tax-exempt status rulings. Hence, it threatens the continued effectiveness of the entire rulings program of the Internal Revenue Service. If changes of such a fundamental character in the administration of the tax laws and the *Williams Packing* rule are to be forthcoming, they should be made by Congress and not by the courts.

ARGUMENT

THE COURTS HAVE NO JURISDICTION TO ENTERTAIN SUITS FOR INJUNCTIVE AND DECLARATORY RELIEF RESPECTING THE COMMISSIONER'S REVOCATION OF RULINGS DETERMINING TAX-EXEMPT STATUS AND DEDUCTIBILITY OF CONTRIBUTIONS.

A. Bob Jones University's suit was barred by the Anti-Injunction Act.

1. *Judicial review of tax decisions is available only within the statutory scheme provided by Congress.*

The federal Anti-Injunction Act provides, with exceptions not here relevant, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person * * *." The statute was enacted in 1867 [14] in order to prevent the same type of injunctive suits which had swept over the state taxation systems from similarly inundating the federal tax system. This Court thereafter recognized the congressional policy which underlay the passage of the Act, namely, that

[14] The statute originated as Section 10 of the Act of March 2, 1867, c. 169, 14 Stat. 471, and is now codified as Section 7421(a) of the Internal Revenue Code of 1954.

if the courts exercised general injunctive power with respect to the collection of taxes, the very existence of government would be threatened. See *State Railroad Tax Cases*, 92 U.S. 575, 613; *Cheatham* v. *United States*, 92 U.S. 85, 89; *Snyder* v. *Marks*, 109 U.S. 189, 193-194.[15] The barring of such suits is necessary to enable the Treasury Department effectively to discharge its duty of "superintend[ing] the collection of the revenue * * *" which the First Congress delegated to it.[16] This includes a wide variety of administrative acts, including the acceptance of tax returns for filing, audits of returns, and promulgation of regulations and revenue rulings.

While Congress has foreclosed injunctive actions to restrain the assessment and collection of taxes, it has established a statutory scheme which generally provides taxpayers with two methods of obtaining judicial review of certain types of actions taken by the Treasury. First, with respect to income, estate and gift taxes, a taxpayer may obtain review of a notice of deficiency without having to pay the disputed amount by filing a timely petition in the Tax Court. Sections 6212 and 6213 of the Internal Reveiue Code of 1954.[17] Alternatively, a taxpayer may

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[15] These cases and the historical background of judicial review in tax cases are discussed in greater detail at pp. 13-17 in our brief in No. 72-1371.

[16] Act of September 2, 1789, c. 12, 1 Stat. 65. See currently, Revised Statutes § 248 (31 U.S.C. 1002).

[17] The existence of the Tax Court review procedure does not conflict with the government's fundamental right to assess and collect taxes prior to litigation. Under the jeopardy assessment procedures of Section 6861, the Commissioner

pay the disputed amount of any type of tax, file a claim for refund, and obtain judicial review of the Treasury's denial of the claim (or its failure to act on the claim within six months) by a suit for refund in a district court or in the Court of Claims. Sections 6532 and 7422 of the Code; 28 U.S.C. 1346 and 1491.

These statutory methods of judicial review provide a workable system for the courts to resolve tax controversies between taxpayers and the government. Common to both methods, however, is the requirement that there be a concrete dispute over a specific amount of money, either by way of deficiency or claimed refund. The system does not comprehend the judicial resolution of abstract tax controversies in advance of an assertion by the Treasury against a taxpayer that a particular amount is owed.

The statutory prohibition on injunctions against tax assessment or collection activities by the Treasury is subject to one narrowly limited exception created by this Court. In *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, 7, the Court unanimously held that a taxpayer might obtain an injunction against assessment or collection of taxes only if he satisfied a two-fold test: first, he must show that "it is clear that under no circumstances could the Government ultimately prevail" on the merits of its legal claim; secondly, he must show that "equity jurisdiction

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may assess and collect taxes at any time before or during Tax Court proceedings if he "believes that the assessment or collection * * * will be jeopardized by delay * * *."

otherwise exists" because of the threat of irreparable injury for which there is no adequate legal remedy.[18] The applicability of that exception is at issue here.

Williams Packing held that a claim of irreparable injury, without more, cannot justify injunctive relief, preliminary or otherwise, against the assessment and collection activities of the Treasury. There, the taxpayer sought an injunction against the collection of social security and unemployment taxes claimed by the Internal Revenue Service to be past due. The taxpayer asserted that collection of the taxes would cause it irreparable injury. The Court, however, held that "such a suit may not be entertained merely because collection would cause an irreparable injury, such as the ruination of the taxpayer's enterprise" (370 U.S. at 6). It observed that the manifest purpose of the Anti-Injunction Act is "to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal rights to the disputed sums be determined in a suit for refund" (370 U.S. at 7).

Because the record revealed that "the Government's claim of liability was not without foundation" (370 U.S. at 8), there was no need for the Court to determine whether a refund suit presented taxpayer with an adequate legal remedy. No suit for an injunction could be maintained because it was not apparent "under the most liberal view of the law

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[18] In *Williams Packing*, the Court clarified the "exceptional circumstances" test announced in *Miller* v. *Nut Margarine Co.*, 284 U.S. 498.

and the facts, [that] the United States [could] not establish its claim" (370 U.S. at 7).

Similarly, here, it is beyond question that Bob Jones University cannot satisfy the first condition of the twofold *Williams Packing* test. As we shall demonstrate below, it is not clear that under no circumstances the government cannot ultimately prevail in its claim that the University's racially discriminatory policy removes it from the tax-exempt status granted by Code Section 501(c)(3) to organizations "organized and operated exclusively for religious, charitable * * * or educational purposes * * *." Thus, its claim that the proposed withdrawal of its tax ruling will cause it irreparable injury through decreased contributions cannot support a suit for injunctive relief restraining the Commissioner from withdrawing its ruling.

The University's failure to meet this aspect of the *Williams Packing* test is in itself sufficient to bar its suit for injunctive relief and this was the ground of the Fourth Circuit's decision.[19] We shall also show

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[19] Although the government argued in the Fourth Circuit that the tax exception to the Declaratory Judgment Act, 28 U.S.C. 2201-2202, offered an independent basis for concluding that the courts have no jurisdiction to enjoin the Commissioner with respect to the withdrawal and issuance of tax rulings, the court relied only upon the Anti-Injunction Act. For the reasons set forth at pages 37-42 in our brief in No. 72-1371, we believe that the bar in 28 U.S.C. 2201 against any declaratory suit "with respect to Federal taxes" is an independent statutory prohibition against the type of suit brought by both Bob Jones University and Americans United. Neither of them, however, has made any argument with respect to the

that the University had adequate legal remedies available to challenge the action of the Commissioner.[20] There are at least two, and probably three, fully adequate legal means by which the University could have litigated its eligibility for tax deductible contributions. On either basis, therefore, the Commissioner could not be enjoined from withdrawing the tax ruling respecting the University's tax exempt status and deductibility of contributions made to it.

Finally, we submit that there is no basis for expansion of the *Williams Packing* rule to encompass injunctive actions with respect to the rulings of tax-exempt organizations. The policy against allowing the judicial branch to interfere with the orderly collections of revenues is equally applicable to disputes involving claimed exemptions as it is to any other type of tax controversy.

2. *Bob Jones University's suit for injunctive relief is prohibited by the express terms of the Anti-Injunction Act.*

a. Before considering whether Bob Jones University can meet the twofold test established by this

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Declaratory Judgment Act except the erroneous contention that the two statutory provisions are coterminous. See our brief in No. 72-1371 at pages 40-42. (See University Br. 13, n. 3; Americans United Br. 6, n. 5). We therefore confine our discussion in this brief to the Anti-Injunction Act.

[20] Without considering the legal remedies available to the University, the Fourth Circuit deemed the loss of contributions which would have resulted from the loss of its ruling to be an irreparable injury within the meaning of *Williams Packing* (App. A136).

Court's *Williams Packing* decision, we examine the facts of its case in relation to the statutory language of the Anti-Injunction Act. In 1942, the University (then Bob Jones College) received an advance letter ruling from the Internal Revenue Service advising that it was exempt from income taxes under the predecessor of Code Section 501(c)(3), Appendix, *infra*, pp. 43-44, and that contributions to it would be deductible by the donors under the predecessor of Section 170(c)(2), Appendix, *infra*, pp. 42-43. Since all organizations exempt from tax under Section 501 (c)(3) are also exempt from federal unemployment taxes under Code Section 3306(c)(8), Appendix, *infra*, pp. 44-45, the letter ruling necessarily assured the University that it would not be liable for unemployment taxes as well.

In 1971, the Internal Revenue Service proposed to withdraw this letter ruling because of the University's discriminatory admissions policy. This action was the result of a change in policy initiated only after the most intensive study by both the Departments of Justice and the Treasury. Despite the repeated statements made by representatives of the University in numerous preliminary conferences with Internal Revenue Service officials that it refused to alter its racially discriminatory admissions policy, in September, 1971, the Internal Revenue Service was nevertheless prepared to follow the prescribed administrative procedures providing for conferences and receipt of written submissions prior to rendering a final decision respecting the University's tax ruling.

But before these procedures could be commenced, the University initiated this suit for injunctive relief. As a result, the Internal Revenue Service has not yet taken any action altering the University's tax status.[21]

Can it be seriously doubted that the order of the district court was an injunction against "the assessment or collection of any tax" within the meaning of the Anti-Injunction Act? The answer, we submit, is plainly no. Assuming that the Internal Revenue Service had been permitted to pursue its procedures and that the University's ruling had been ultimately withdrawn, contributors to the University would have become liable for income tax deficiency assessments for any charitable deductions taken with respect to contributions made after suspension of the deductibility assurance aspect of the ruling. More-

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[21] Although the court of appeals reversed the district court's order granting a preliminary injunction against the Commissioner (App. A137-A140) and the Chief Justice denied the University's application for a stay of the mandate on April 3, 1973 (App. A156), the district court's order has never been dissolved. On April 2, 1973, the University filed a motion in the district court seeking to prevent the dissolution of the preliminary injunction insofar as it prevented the Internal Revenue Service from suspending the aspect of the ruling assuring the deductibility of contributions. The government opposed this motion on the ground that it was contrary to the mandate of the court of appeals and requested prompt dissolution of the injunction. The district court, however, took no action. On October 12, 1973, it informed the parties that it would not act upon the government's request that the order be formally dissolved because the grant of the writ of certiorari had, in its view, deprived it of any further jurisdiction.

over, the University itself would have become liable for the payment of income taxes [22] and federal unemployment taxes. But the preliminary injunction issued by the district court has resulted in unwarranted claims of charitable deductions by the University's contributors as well as the avoidance of tax liability by the University itself.[23] The Internal

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[22] Most educational institutions operate at a loss and the lack of an exemption from income taxes would not result in any income tax liability. However, the affidavit of the University's accountant states that the federal income tax liability of the University for its taxable years ended May 31, 1971 and May 31, 1972, would have been $750,000 and in excess of $500,000, respectively (App. A43-A44).

[23] Because Bob Jones University brought its action for injunctive relief before the Internal Revenue Service could withdraw its tax ruling, it sought to restrain the Commissioner from revocation of the ruling. This relief differs from that sought by Americans United, whose ruling had already been revoked by the Internal Revenue Service. As a result, that organization sued to have its ruling reinstated. Since Americans United asked for affirmative action by the Commissioner, the government raised the defense of sovereign immunity, discussed at pages 42-49 of our brief in No. 72-1371.

This defense is not available against Bob Jones University because it did not seek affirmative action by the Commissioner but simply a prohibitory order against the withdrawal of its ruling. This distinction, while relevant for purposes of sovereign immunity (see *Knight* v. *State of New York*, 443 F. 2d 415, 420-421 (C.A. 2) and *Zapata* v. *Smith*, 437 F. 2d 1024 (C.A. 5)), does not, as Americans United suggests (Br. 41-42), minimize the conflict between the circuits in the two cases with respect to the substantive issue of the availability of injunctive relief.

Moreover, the University erroneously relies (Br. 30) upon the sovereign immunity cases as a basis for its suit on the ground that the Commissioner allegedly acted beyond the

Revenue Service's inability to take action with respect to these matters prevented its assessment and collection of taxes.[24]

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scope of his authority and in an unconstitutional manner. But apart from the *Williams Packing* "under no circumstances" test, the concept of *ultra vires* action has no independent significance as an exception to the Anti-Injunction Act. Allegations of unconstitutionality do not establish an exception to the Anti-Injunction and Declaratory Judgment Acts. See pages 21-23 of our brief in No. 72-1371.

[24] The argument of *amicus* Council on Foundations (Br. 13-16) that the Anti-Injunction and Declaratory Judgment Acts prohibitions do not apply here because no assessments have yet been made, was properly rejected by both the Fourth Circuit and the District of Columbia Circuit (App. A135; R. 31). The University and Americans United have now abandoned the argument with good reason since the courts have long considered suits to enjoin preassessment administrative actions as in effect injunctions against assessment. See *Zamaroni* v. *Philpott*, 346 F. 2d 365 (C.A. 7) (suit to enjoin use of evidence in future action not yet in being); *Wahpeton Professional Services, P.C.* v. *Kniskern*, 275 F. Supp. 806 (D. N. Dak.) (suit to require issuance of professional corporation ruling); *National Council on the Facts of Overpopulation* v. *Caplin*, 224 F. Supp. 313 (D.D.C.) (suit to require issuance of tax exemption ruling); *Koin* v. *Coyle*, 402 F. 2d 468 (C.A. 7) (suit to enjoin use of certain evidence in making an assessment); *Brewster* v. *United States*, 423 F. 2d 1061 (C.A. 5) (suit to restrain audit, review, or discussion of plaintiff's taxes); *Balistrieri* v. *United States*, 303 F. 2d 617 (C.A. 7) (suit to enjoin issuance of administrative summons of records); *Campbell* v. *Guetersloh*, 287 F. 2d 878 (C.A. 5) (suit to restrain use of "bank desposit" method to compute tax deficiency); *William B. Scaife & Sons Co.* v. *Driscoll*, 94 F. 2d 664 (C.A. 3), certiorari denied, 305 U.S. 603 (suit to enjoin Commissioner's refusal to allow filing of amended return); *West Chester Feed & Supply Co.* v. *Erwin*, 438 F. 2d 929 (C.A. 6) (suit to require Commissioner

b. The ultimate effect of such injunctive actions upon the assessment and collection of taxes cannot be minimized by simply recharacterizing these suits, as Americans United contends (Br. 23), as attempts by such an organization to relieve itself of the "burden of not being able to raise funds" [25] To begin with, the withdrawal of such a ruling is obviously not a flat prohibition against the raising of funds. Moreover, even acknowledging that the suspension of an organization's deductibility assurance ruling might make its task of raising of funds more difficult, the alternative would be an immediate reduction of the revenues through allowance of preliminary injunc-

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to reappraise property); *Ralston* v. *Heiner*, 21 F. 2d 494 (W.D. Pa.), affirmed, 24 F. 2d 416 (C.A. 3), certiorari denied, 277 U.S. 608 (suit to remove lien from property); *Calkins* v. *Smietanka*, 240 Fed. 138, 145-146 (N.D. Ill.) (suit to prevent production of records to Commissioner); *Gouge* v. *Hart*, 250 Fed. 802, 805 (W.D. Va.) (suit to nullify Government purchase of land at tax sale); *Tomlinson* v. *Poller*, 220 F. 2d 308 (C.A. 5), and *Czieslik* v. *Burnet*, 57 F. 2d 715 (E.D. N.Y.) (suit to prevent Commissioner's subjecting of property to tax lien); *Chester* v. *Ross*, 231 F. Supp. 23, 26 (N.D. Ga.), affirmed *per curiam* 351 F. 2d 949 (C.A. 5) (suit to restrain Commissioner's gathering of evidence to investigate plaintiff's taxes); *Miles* v. *Johnson*, 59 Fed. 38 (Cir. Ct. Ky.) (suit to restrain Commissioner from preventing withdrawal of whiskey which would exempt it from tax).

[25] Contrary to the view of the District of Columbia Circuit, we have argued at pages 23-24 of our brief in No. 72-1371, that such injunctive actions cannot be upheld on the basis of a simple assertion that the "primary design" of the complainant was not to restrain the assessment or collection of taxes.

tions in such cases. By enacting both the Anti-Injunction Act and adding the tax exception to the Declaratory Judgment Act, Congress has indicated that it did not intend the courts to interfere with the collection of revenues, whatever may be the impact of that principle upon the fund-raising ability of organizations claiming to be exempt from tax. Permitting such suits by alleged tax exempt organizations would have no less serious impact upon tax collection than permitting such suits by others.

It is accordingly not surprising that, except for the decision of the District of Columbia Circuit in No. 72-1371, every reported decision considering the question has held that the Anti-Injunction Act bars the courts from enjoining the Treasury from withdrawing tax-exemption or deductibility assurance rulings. *Crenshaw County Private School Foundation* v. *Connally*, 474 F. 2d 1185 (C.A. 5), petition for a writ of certiorari pending, No. 73-10; *Jolles Foundation, Inc.* v. *Moysey*, 250 F. 2d 166, 169 (C.A. 2); *Mitchell* v. *Riddell*, 402 F. 2d 842 (C.A. 9), appeal dismissed and certiorari denied, 394 U.S. 456; *National Council on the Facts of Overpopulation* v. *Caplin*, 224 F. Supp. 313 (D. D.C.); *Kyron Foundation, Inc.* v. *Dunlap*, 110 F. Supp. 428 (D. D.C.); *Israelite House of David* v. *Holden*, 14 F. 2d 701 (W.D. Mich.).

c. Bob Jones University does not rely upon the tripartite exception to the Anti-Injunction Act created by the District of Columbia Circuit in No. 72-1371.

Recognizing that the withdrawal of its ruling would have resulted in assessments and collections of additional taxes, it simply contends (Br. 28) that the prohibitions of the Anti-Injunction Act are not applicable because "this is not a tax case" but the use of "the onerous taxing power of the government to force recalcitrant parties in line with social concepts not in any way authorized by any act of Congress." [26] But as the Fourth Circuit noted (App. A137-A138), this Court had rejected such an argument more than 50 years ago in *Bailey* v. *George*, 259 U.S. 16. There, the Court refused to enjoin the collection of a child labor tax despite the contention that the tax was not for the purpose of raising revenue but for regulating child labor. Indeed, the Court rejected the taxpayer's claim for equitable relief notwithstanding its holding on the same day that the tax at issue was unconstitutional. *Child Labor Tax Case*, 259 U.S. 20.

Moreover, given the impossibility of determining whether a tax is regulatory [27] or revenue-producing, the conclusion reached in *Bailey* v. *George*, *supra*, is manifestly sound. As the Court subsequently observed in *Sonzinsky* v. *United States*, 300 U.S. 506,

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[26] Americans United (Br. 20) and *amicus* Council on Foundations (Br. 22-23) advance essentially the same contention. They urge that the Commissioner's policies with respect to tax-exempt organizations are more regulatory than revenue producing.

[27] It is noteworthy that Congress added the tax exception to the Declaratory Judgment Act in response to suits challenging the processing taxes, which could be classified as "regulatory". See *United States* v. *Butler*, 297 U.S. 1, 61.

513: "Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed. But a tax is not any the less a tax because it has a regulatory effect."

Thus, in numerous cases, the lower courts have upheld the statutory bars on injunctions against the Commissioner with respect to a variety of arguably regulatory taxes levied upon certain commodities or activities. See, *e.g.*, *Singleton* v. *Mathis*, 284 F. 2d 616 (C.A. 8) (federal gambling tax); *Vasilinda* v. *United States*, C.A. 5, No. 71-1802, Slip Op. 3, fn. 2 (decided November 12, 1973) (marihuana taxes); *Lassoff* v. *Gray*, 266 F. 2d 745 (C.A. 6) (marihuana taxes); *Wells* v. *Campbell*, 113 F. Supp. 928 (N.D. Tex.) (marihuana taxes); *McAlister* v. *Cohen*, 436 F. 2d 422 (C.A. 4) (wagering taxes); *Gehman* v. *Smith*, 76 F. Supp. 805, 807-808 (E.D. Pa.) (tax on adulterated butter).

d. Finally, both Bob Jones (Br. 29-30) and Americans United (Br. 20-21) attempt to escape the application of the *Williams Packing* standard by relying upon earlier decisions of this Court such as *Hill* v. *Wallace*, 259 U.S. 44; *Lipke* v. *Lederer*, 259 U.S. 557; *Allen* v. *Regents*, 304 U.S. 439. Those cases involved applications of the "special and extraordinary facts and circumstances" test of *Miller* v. *Nut Margarine Co.*, 284 U.S. 498, 511. But the confusion over the interpretation of that standard was the precise reason given by this Court for hearing and deciding *Williams Packing* (see 370 U.S. at 2-3 and n. 1). The subsequently announced *Williams*

Packing rule was intended as a substitute and not as an additional test for determining the applicability of the Anti-Injunction Act.[28]

3. ***The proposed revocation of Bob Jones University's tax ruling because of its racially discriminatory admissions policy is not a case in which it is clear that under no circumstances could the government prevail on the merits of its claim.***

Section 501(c)(3) of the Code, Appendix, *infra*, pp. 43-44, provides a tax exemption for organizations

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[28] In *Hill* v. *Wallace*, members of the Chicago Board of Trade had brought a type of shareholder derivative suit against the Board in order to test the constitutionality of a tax upon grain future transactions. Because the Commissioner of Internal Revenue was not served, he was dismissed as a defendant (259 U.S. at 72). Since the Court was likely to render an opinion as to the constitutionality of the statute, the Solicitor General appears to have waived the benefit of the Anti-Injunction Act and argued the substantive issue of the constitutionality of the statute (see 257 U.S. 310, 615). See also *Helvering* v. *Davis*, 301 U.S. 619. Similarly, *Lipke* v. *Lederer*, 259 U.S. 557, is not in point, as it involved penalties in the nature of punishment for a criminal offense, the violation of the National Prohibition Act. As the Court later stated in *Graham* v. *duPont*, 262 U.S. 234, 257, *Lipke* was "not [a case] of enjoining taxes at all."

Moreover, *Allen* v. *Regents*, 304 U.S. 439, does not, as Americans United suggests (Br. 21-23), support the proposition that the Anti-Injunction Act does not bar a suit by nontaxpayers regarding their statutory duties to collect and remit taxes owed by others. The lower courts have held to the contrary with respect to certain excise taxes and withholding taxes. *Jules Hairstylists of Maryland* v. *United States*, 268 F. Supp. 511 (D. Md.), affirmed *per curiam*, 389 F. 2d 389 (C.A. 4), certiorari denied, 391 U.S. 934; *Reamis* v. *Vroorman-Fehn Printing Co.*, 140 F. 2d 237 (C.A. 6). See also *Eighth Street Baptist Church* v. *United States*, 431 F. 2d 1193 (C.A. 10).

"organized and operated exclusively for religious, charitable * * * or educational purposes." Section 170(a) and (c)(2), Appendix, *infra*, permit a deduction for any "charitable contribution" made to such organizations. These statutes were respectively enacted in 1913 and 1917 in order to maintain public support of charities in the face of increased taxation. They are in *pari materia* and are designed to encourage organizations to perform beneficial functions which the government would otherwise have to conduct. See H. Rep. No. 1860, 75th Cong., 3d Sess., p. 19; 50 Cong. Rec. 1259; 55 Cong. Rec. 6728-6729, 6741; Weil, *Tax Exemptions for Racial Discrimination in Education*, 23 Tax L. Rev. 399, 401-402.

Since the Section 170(a) deduction is allowed for a "charitable contribution," it has been held that the recipient organization must qualify as "charitable," even if it performs "religious" or "educational" functions. *Green* v. *Connally*, *supra*, 330 F. Supp. at 1157-1160. See also Rev. Rul. 67-325, 1967-2 Cum. Bull. 113, 116 and authorities cited therein; Reiling, *Federal Taxation: What is a Charitable Organization?*, 44 A.B.A.J. 525, 527; Note, *Federal Tax Benefits to Segregated Private Schools*, 68 Col. L. Rev. 922, 941-942. This reading of the statutory provisions is supported by the Court's statement in *Helvering* v. *Bliss*, 293 U.S. 144, 147, that the deduction provision was enacted "in order to encourage gifts to religious, educational *and other charitable objects* * * *." (Emphasis supplied.)

At common law, a charitable trust could not be created for a purpose which is illegal or whose accomplishment would tend to frustrate some well-settled public policy. *Ould* v. *Washington Hospital for Foundlings*, 95 U.S. 303, 311; Restatement of Trusts 2d, § 377, comment c. In light of this Court's historic decision in *Brown* v. *Board of Education*, 347 U.S. 483, and its progeny, it is beyond question that there is now a broad national policy against segregation in public education and public facilities as well as governmental assistance to private segregated facilities. Not only has this policy against segregated education been manifested in numerous decisions of this Court, but it has also found expression in Acts of Congress. Notably, Section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, forbids discrimination on the grounds of race, color, or national origin in "any program or activity receiving Federal financial assistance." Thus, the national policy against segregated public education has been extended to forbid governmental aid to any program, public or private, which excludes or denies benefits to persons on the basis of race.[29]

Most recently, in *Norwood* v. *Harrison*, No. 72-77, October Term, 1972 (decided June 25, 1973), the Court struck down a Mississippi free textbook loan

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[29] See also, *Evans* v. *Abney*, 396 U.S. 435; *Commonwealth of Pennsylvania* v. *Brown*, 392 F. 2d 120 (C.A. 3), certiorari denied, 391 U.S. 921; *Wachovia Bank and Trust Co., N.A.* v. *Buchanan*, 346 F. Supp. 665 (D. D.C.); *Connecticut Bank & Tr. Co.* v. *Johnson Memorial Hospital*, 30 Conn. Supp. 1, 294 A.2d 586 (Conn. Super. Ct.).

program because it provided aid to both public schools and private racially segregated schools. In so holding, the Court observed (Slip Op. 10) that "[a] State may not grant the type of tangible financial aid here involved if that aid has a significant tendency to facilitate, reinforce, and support private discrimination."

Similarly, the recognition by the Internal Revenue Service of Bob Jones University's tax-exempt status and the right to receive tax-deductible contributions serves to "facilitate, reinforce, and support" its racially discriminatory admissions policy within the meaning of *Norwood*. Indeed, the importance of this tax treatment to the University's program is amply demonstrated by its effort to restrain the Commissioner in this case. Maintenance of this tax benefit cannot be allowed because it would, as this Court stated in an analogous context, "frustrate sharply defined national or state policies proscribing particular types of conduct, evidenced by some governmental declaration thereof." *Tank Truck Rentals, Inc.* v. *Commissioner*, 356 U.S. 30, 33-34.

In light of these authorities, the conclusion of the three-judge court in *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C.), affirmed *sub nom. Coit* v. *Green*, 404 U.S. 997, that private schools practicing racial discrimination are not entitled to tax exemption or deductible contributions, appears to be inescapable. As a result, the potential withdrawal of the University's tax ruling under the announced policy of the Internal Revenue Service which is squarely in accord with the *Green* decision is manifestly sound. But under

the *Williams Packing* test, it is not necessary to demonstrate the correctness of this position on the merits. Rather, the University's claim for injunctive relief can only succeed if it can show that under no circumstances could the government ultimately prevail on the merits of its claim.

Given the extensive analysis of the question in the *Green* decision, it can hardly be said that "under no circumstances" could the government prevail in establishing that the University's conduct rendered it ineligible for the federal tax benefits in question. On this basis, the Fourth Circuit correctly rejected the University's claim for injunctive relief against the Commissioner.

B. Both Americans United and Bob Jones University have adequate legal means to litigate their eligibility for exempt status and tax deductible contributions.

In our brief in No. 72-1371 (pp. 34-37), we have pointed out that Americans United had at least two fully adequate legal means to challenge the Commissioner's revocation of its ruling. First, it could have filed a claim for refund of F.U.T.A. taxes which were due once its exemption was withdrawn.[30] Secondly, it could have arranged for a contributor to

[30] Contrary to the contention of Americans United (Br. 35), a charitable trust is also exempt from F.U.T.A. taxes and would therefore also be able to test its exempt status in a F.U.T.A. tax refund suit. Regardless of the application of Section 642(c), such trusts have long been held to be exempt under Section 501(c)(3). See, *e.g.*, *Fifty-Third Union Trust Co.* v. *Commissioner*, 56 F. 2d 767 (C.A. 6); Rev. Proc. 73-29 1973-40 I.R.B. 18.

test his right to a charitable deduction in a Tax Court proceeding or refund suit.

These two remedies would have been available to Bob Jones University as well. In addition, it appears that the University had a third legal remedy at its disposal. Given its accountant's sworn statement (App. A43-A44) that the University itself would have owed substantial amounts of income if its ruling had been withdrawn, it could have litigated its right to exempt status either in the Tax Court or in a refund suit.[31]

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[31] This latter remedy was not available to Americans United because its lobbying activities did not terminate its exemption from income taxes. Rather, the Commissioner's action with respect to Americans United was to reclassify it as a Section 501(c)(4) organization which, while exempt from income taxes, is ineligible to receive tax deductible contributions. On the University's petition for rehearing, the Fourth Circuit (App. A150-A151) erroneously distinguished the Commissioner's action in the *Americans United* case on the ground that it did not affect the organization's tax liability at all. However, as a Section 501(c)(4) organization, Americans United did become liable for F.U.T.A. taxes. In any event, we submit that the effect of the injunction against assessment of donors is barred by the Anti-Injunction Act.

Americans United (Br. 34) and *amicus* Council on Foundations (Br. 11) argue that the refund suit is inadequate because the Internal Revenue Service might not issue the contested ruling even if the taxpayer prevailed on the merits in the refund suit. In support of this contention, they cite Paragraph 270 of the IRS Exempt Organization Handbook, which requires that an organization prevailing in a court test of its exempt status must file an exemption application and establish its right to exemption before the Internal Revenue Service will recognize its exempt status for years subsequent to those involved in the court's decision. As the agency charged with

Neither the University, Americans United, nor the *amici* question the existence and availability of these legal remedies. They urge, however, that the loss of contributions attendant upon the withdrawal of a tax ruling is an irreparable injury for which the legal remedies are inadequate.[32] But even assuming that the loss of contributions would constitute an irreparable injury, this Court in *Williams Packing* held that that claim alone is insufficient to support a suit for injunctive relief against the assessment or collection of taxes. In appraising the scope of the Anti-Injunction Act, the Court emphasized that Congress did not make the availability of the injunctive remedy depend upon the lack of an efficient legal remedy as it did with respect to injunctions against state taxes. Cf. 28 U.S.C. 1341. Thus, the Court observed, "[i]ts failure to do so shows that such a suit [against federal tax collections] may not be entertained merely because collection would cause an

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the administration of the tax statutes, it is necessary for the Internal Revenue Service to receive an application from such an organization in order to determine that the facts and law upon which the judgment of the court was based remains the same. We are advised by the Internal Revenue Service that while this requirement is absolutely necessary from an administrative standpoint, its normal practice is to issue a favorable ruling upon the application of an organization which has prevailed in a court suit.

[32] Moreover, it is the policy of the Internal Revenue Service to assist in preserving the recurring legal issues presented in such cases for presentation to the courts. *Mitchell* v. *Riddell*, 402 F. 2d 842 (C.A. 9), relied upon by Americans United (Br.

irreparable injury, such as the ruination of the taxpayer's enterprise (370 U.S. at 6).[33]

Thus, in urging that the loss of contributions caused by the Commissioner's withdrawal of an exempt organization's ruling is an injury which warrants equitable relief, both the University and Amer-

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28), is not to the contrary. There, the taxpayer did not even fill out a tax return and a tax was never assessed. Instead, he merely sent $10 to the Internal Revenue Service with a statement that no tax was due for any year, and then demanded a refund on the ground that a trust was tax exempt. See Brief for the District Director, *Mitchell* v. *Riddell* (C.A. 9), No. 22406, pp. 3-6.

Finally, Americans United (Br. 32) points to the government's ability to moot out a refund suit as a limitation upon the adequacy of such a remedy, citing *Church of Scientology of Hawaii* v. *United States*, 485 F. 2d 313 (C.A. 9). But that case did not involve an attempt to avoid a legal test. The issue there was whether the organization's income in 1965 and 1966 inured to the benefit of private individuals in violation of the requirement of Section 501(c)(3). That issue was entirely factual and involved a development of the facts for each individual year. Neither the government's attempt to moot the suit, nor a judicial decision on the merits, would control the organization's right to a deductibility assurance or tax exemption ruling for any other years.

[33] Challenging the correctness of this statement of the Court in *Williams Packing*, Americans United (Br. 18, n. 9) attempts to import the exception in 28 U.S.C. 1341 for cases in which there is no "plain, speedy and efficient remedy" into the Anti-Injunction Act involved here. Its argument rests entirely upon statements in the legislative history of 28 U.S.C. 1341 that Congress had previously enacted "similar" measures. While the two statutes may be similar, the differences in their terms amply justify this Court's conclusion that their standards are not identical.

icans United seek a modification of the *Williams Packing* standard. This type of injury, however, is an inevitable consequence of the fact that disputes between taxpayers and the Internal Revenue Service are not instantly resolved through litigation.[34] While this process may be time consuming, the alternative sought by the University and Americans United—the right to a preliminary injunction—would render all contributions deductible throughout the litigation.

Given the broad policy underlying the Anti-Injunction Act,[35] it seems highly unlikely that Congress intended to allow organizations automatically to retain their exemptions and the right to receive deductible contributions during the pendency of the litigation in which their status is determined, in derogation of

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[34] Americans United complains (Br. 33-34) that the legal remedy is inadequate because the unsuccessful party at trial can always appeal. But this is the case with respect to every type of tax litigation under the system of judicial review established by Congress.

[35] Nothing in 28 U.S.C. 1340, relied upon by Americans United (Br. 25), casts doubt upon the broad reach of the Anti-Injunction Act. The former provision gives the district courts subject matter jurisdiction over "any civil action arising under any Act of Congress providing for internal revenue." If this provision were construed as an independent grant of equity powers to the district courts in all federal tax cases, the force of the Anti-Injunction Act would effectively be eliminated. Surely, therefore, the two provisions must be harmoniously construed together so as to permit the district courts only to issue money judgments against the United States in tax cases.

the revenue,[36] regardless of the merits of their claims or the outcome of the litigation. We therefore submit that, other than those cases which meet the two-fold test of *Williams Packing*, no exception can be made from the strict prohibition on injunctions against the assessment or collection of taxes.

When viewed against the background of the entire advance rulings program administered by the Internal Revenue Service, there is little justification for allowing an exception from the *Williams Packing* rule for litigation involving eligibility for exempt status and receipt of deductible contributions. The deeply rooted Congressional policy against injunctions is equally applicable to all federal tax controversies.

Just as the University and Americans United may suffer by not being able to enjoy the benefits of tax deductible contributions while litigating their right to such treatment, many businesses and individuals delay entering into advantageous transactions in order to await the issuance of an Internal Revenue Service ruling with respect to its tax consequences. In many instances, the Internal Revenue Service will ultimately decline to issue the requested ruling or will issue an unfavorable decision. The parties may thereupon decide not to pursue the pro-

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[36] Americans United (Br. 13) and *amicus* Council on Foundations (Br. 16) argue that there would be no revenue losses because prospective donors would simply redirect their contributions to other exempt organizations. Suffice it to say that there is no factual support for this speculative assertion.

posed transaction, often at great financial loss. In such cases, judicial resolution of the tax consequences can only be obtained after the transaction is executed.[37] If, however, taxpayers or affected nontaxpayers could, in advance of a transaction, force the Commissioner to rule favorably or, for that matter, to rule upon a question as to which he has declined to issue a decision, the courts would be inundated with requests for injunctions[38] covering the entire gamut of issues where tax rulings are usually

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[37] For example, in *Commissioner* v. *Gordon*, 391 U.S. 83, this Court considered the tax consequences to the shareholders of a corporate transaction with respect to which the Internal Revenue Service had declined to issue a favorable ruling.

[38] Such judicial intrusions into the rulings program have already occurred. At the urging of an unincorporated association representing participants in a tax shelter cattle feed program which cited the District of Columbia Circuit's *Americans United* decision, a district court has recently issued an injunction forbidding the Internal Revenue Service to disallow deductions for end-of-year payments for feed as a distortion of income. *Cattle Feeders Tax Committee* v. *Shultz*, Civil No. 73-794-C (W.D. Okla.) (decided December 6, 1973). On November 6, 1973, the Internal Revenue Service had announced its intention to disallow these deductions if they materially distort income. See T.I.R. 1261, 1973 CCH Stand. Fed. Tax Rep., par. 6951.

In addition, another district court has ordered the Internal Revenue Service to revoke the exempt status of several hospitals on the alleged ground that they do not admit indigent patients. *Eastern Kentucky Welfare Rights Organization* v. *Shultz*, Civil No. 1378-71 (D.D.C.) (decided December 20, 1973).

sought.[39] Under such circumstances, the discretion necessary to administer the rulings program effectively would be seriously impaired.

In sum, the issuance of injunctions in cases involving eligibility for exempt status is no different in substance from controversies arising under any other provision of the Internal Revenue Code. The subjection of the wide variety of administrative actions of the Internal Revenue Service to judicial review and equitable remedies would severely disrupt the orderly collection of the nation's revenues. Both Congress and this Court have recognized the paramount importance of the revenue collection process and have therefore protected the Treasury from injunctive actions to which most other Executive departments and administrative agencies are subject. The rationale of the District of Columbia Circuit's modification to the strict protection afforded by the *Williams Packing* standard cannot be logically

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[39] Common examples of requests for rulings by nontaxpayers include applications by governmental units as to whether interest on their bonds is exempt under Code Section 103; applications by corporations as to the tax effect of certain reorganization transactions on their shareholders; applications by employers as to the tax effect of pension plans upon their employees; applications by regulated investment companies (see Code Sections 851-855) regarding the tax effect of transactions on their shareholders; applications by cooperative housing corporations regarding the tax effects of their transactions on their tenant stockholders (see Code Section 216); applications by trade associations respecting the tax effect of transactions on their members; and applications by banks regarding the includability of accrued interest in the income of their depositors.

limited to questions involving tax-exempt status rulings. Modification of this strict protection in any respect would have a far reaching effect upon the collection of revenues and the administration of the entire tax ruling program. If changes of such a fundamental character are to be forthcoming with respect to the rule of *Williams Packing*, we submit that they should be made by Congress and not by the courts.

CONCLUSION

For the reasons stated, the judgment of the court of appeals in No. 72-1470 should be affirmed and the judgment of the court of appeals in No. 72-1371 should be reversed and the cause remanded to the district court with instructions to dismiss the complaint.

Respectfully submitted.

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JANUARY 1974.

APPENDIX A

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 170. CHARITABLE, ETC., CONTRIBUTIONS AND GIFTS.

* * * *

(c) [as amended by Sec. 201(a), Tax Reform Act of 1969, P.L. 91-172, 83 Stat. 487] *Charitable Contribution Defined.*—For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of—

* * * *

(2) A corporation, trust, or community chest, fund, or foundation—

(A) created or organized in the United States or in any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States;

(B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes or for the prevention of cruelty to children or animals;

(C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and

(D) no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (includ-

ing the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

A contribution or gift by a corporation to a trust, chest, fund, or foundation shall be deductible by reason of this paragraph only if it is to be used within the United States or any of its possessions exclusively for purposes specified in subparagraph (B).

* * * *

SEC. 501. EXEMPTION FROM TAX ON CORPORATIONS, CERTAIN TRUSTS, ETC.

* * * *

(c) *List of Exempt Organizations.*—The following organizations are referred to in subsection (a):

* * * *

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political

campaign on behalf of any candidate for public office.

(4) Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

* * * *

SEC. 3301 [as amended by Sec. 301(a), Employment Security Amendments of 1970, P.L. 91-373, 84 Stat. 695]. RATE OF TAX.

There is hereby imposed on every employer (as defined in section 3306 (a)) for the calendar year 1970 and each calendar year thereafter an excise tax, with respect to having individuals in his employ, equal to 3.2 percent of the total wages (as defined in section 3306 (b)) paid by him during the calendar year with respect to employment (as defined in section 3306 (c)).

SEC. 3306. DEFINITIONS.

* * * *

(c) [as amended by Sec. 105(a), Social Security Amendments of 1970, *supra*] *Employment.*—For purposes of this chapter, the term "employment" means any service performed prior to 1955, which was employment for purposes of subchapter C of chapter 9 of the Inter-

nal Revenue Code of 1939 under the law applicable to the period in which such service was performed, and (A) any service, of whatever nature, performed after 1954 by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, or (ii) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, * * * except—

* * * *

(8) [as amended by Sec. 533, Social Security Amendments of 1960, P.L. 86-778, 74 Stat. 924] service performed in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) which is exempt from income tax under section 501(a);

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) [as amended by Sec. 110(c), Federal Tax Lein Act of 1966, P.L. 89-719, 80 Stat. 1125] *Tax.*—Except as provided in sections 6212 (a) and (c), 6213 (a), and 7426 (a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such

person is the person against whom such tax was assessed.

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§ 2201 [as amended by Sec. 111, Act of May 24, 1949, c. 139, 63 Stat. 89]. *Creation of remedy.*

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

§ 2202. *Further relief.*

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

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